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PRE-MERGER ANALYSIS IN BRAZIL: FIRST ROUND (2012-2014)

Carlos Emmanuel Joppert Ragazzo and
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ABSTRACT

In spite of the initial skepticism shown by national and international media, Brazil's new antitrust law (Law 12.529/11), which replaced Law 8.884/94, since coming into force, has brought several improvements for the Brazilian competition protection policy. Among the substantial structural changes made, one must note that the main change was, undoubtedly, the institution of the pre-merger analysis. The referred alterations, however, have proved to be insufficient in regards to the numerous challenges generated by the new system, creating the additional need for innovations also in the managerial field. Therefore, the present work aims to present and analyze such managerial innovations created by CADE's General-Superintendence team, which have enabled the implementation of the new pre-merger analysis system established by Law 12.259/11.

KEYWORDS: Pre-merger Analysis–CADE's General-Superintendence–Managerial Innovations–Law 12.259/11–CADE.

I. INTRODUCTION

IN August 2012, The Economist magazine, using a free translation, called the *a posteriori* control of mergers a “Brazilian oddity.”¹ This evaluation reflected the reaction to an outdated system for the management of transactions, which resulted in terms and analyses that were longer than the ones observed in developed countries. Only a few less

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1. “[This] year has seen the demise of a Brazilian oddity: an antitrust regime that allowed companies to merge first and the regulator to ask questions only later.” *A Champion for Choice?*, *ECONOMIST* (Aug. 25, 2012), available at <http://www.economist.com/node/21560892>.

influential economies adopted a system similar to ours, allowing the transaction to be completed before the approval by the competition authority.

Despite the fact that Brazil's competition policy has evolved ever since Law 8.884/94 came into force, from the beginning of 2000, there had been the feeling that something needed to be done.² Despite the extensive managerial work purported by the three previous bodies of the Brazilian System for Competition Protection (SBDC) under Law 8.884/94,³ without drastic structural changes, there was little room for evolution. The *ex post* analysis system was antagonistic to the best international practices, and it was aggravated by the heavy bureaucratic structure composed of three analytic bodies, known as the "three counters."⁴ The result was an inefficient system, with approval deadlines which were incompatible with the dynamics of global economy, as well as the ineffective policy.⁵

The government, aware of the relevance of the competition protection policy for the country's economic development and after years of discussion within the legislative and executive powers, granted maximum priority to the pending bill in the National Congress, including it in the growth acceleration programme (PAC).⁶ Thus, by the end of 2011, the Congress enacted Law 12.259, which would eventually solve a good portion of the

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2. One of the conclusions of Organisation for Economic Co-operation and Development's (OECD) last Peer Review of the Brazilian competition policy was that the new antitrust law should adopt a pre-merger review system. *See generally* OECD, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 2010, (2010), *available at* <http://www.oecd.org/daf/competition/45154362.pdf>.
 3. Under Law 8.884/1994 there were three antitrust bodies in Brazil: (i) the Secretariat for Economic Monitoring (Seae) from the Ministry of Finance; (ii) the Secretariat for Economic Law (SDE) from the Ministry of Justice; and (iii) the Administrative Council for Economic Defense (CADE) an independent agency. The first two secretariats were responsible for rendering opinion on mergers and for conducting investigation on anticompetitive practices. CADE, in its turn, was the tribunal responsible for judging these cases on the administrative level. *See generally* Lei No. 8.884/94, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1994 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/leis/l8884.htm.
 4. OECD, *supra* note 2, at 11.
 5. *See id.*
 6. Created in 2007, during President Lula's second mandate, the PAC promoted the recovery of the planning and execution of major infrastructure projects of social, urban, logistics and energetic relevance for the country, contributing to its rapid and sustainable development. The economic measures for growth acceleration encompassed the following: (i) Credit Stimulus and Financing; (ii) Improvement of the Investment Environment; (iii) Tax Relief and Management; (iv) Long-term Fiscal Measures; and (v) Fiscal Consistency. The reform of Brazil's antitrust policy was included as one of the most important measures to be taken in order to attract investments. TRIBUNAL DE CONTAS DE UNIÃO [COURT OF UNION ACCOUNTS], RELATÓRIO E PARECER PRÉVIO SOBRE AS CONTAS DO GOVERNO DA REPÚBLICA EXERCÍCIO DE 2009 [PRELIMINARY REPORT AND OPINION ON GOVERNMENT ACCOUNTS OF THE REPUBLIC YEAR 2009] 169 (2009), *available at* http://portal2.tcu.gov.br/portal/page/portal/TCU/comunidades/contas/contas_governo/contas_09/Textos/CG%202009%20Relat%C3%B3rio.pdf; *see also* *Melhoria do Ambiente de Investimento* [Improvement of the Investment Environment], MINISTÉRIO DO PLANEJAMENTO, <http://www.pac.gov.br/sobre-o-pac/medidas/melhoria-do-ambiente-de-investimento> (last visited Apr. 7, 2015).

structural problems known to all agents. Nevertheless, great challenges remained, because the new law clearly lacked managerial solutions for the implementation of the new system of prior analysis of mergers and acquisitions. These solutions were created by employees in the SBDC's three bodies, while handling their increasingly demanding workloads.

A few months before Law 12.259/11 came into force, several agents went to the press willing to express their concerns regarding the new system. Various pieces, political in nature, were published in a number of magazines and newspapers despite not devoted to specializing in reports on the economy. For example, the newspaper O Globo published a piece on April 22, 2012, emphasizing the concern regarding the lack of personnel for the functioning of the new CADE.⁷ Exame magazine was even more emphatic. In a long piece, published on June 13, 2012, it highlighted the excessive bureaucracy of the new body, affirming that with the new competition law, “[i]f an iron and steel mill buys a supermarket, it will have to present 58 documents [to the ‘Supercade’].”⁸ In Germany, it would suffice to send a letter.⁹ The criticism harshened in the rest of the piece—stating with regard to complex transactions, the old system required thirty-five documents, while the new one required 140.¹⁰ The magazine then continued criticizing the excess of bureaucracy of the new model, pointing out that there would be an overdose of papers even in transactions under the fast track procedure.¹¹ Lastly, it estimated that an opinion would take up to forty-five days to be issued and that Supercade could stay inert for months.¹²

The diagnosis reflected in the national press showed that there was a great chance that the new competition protection system would actually deteriorate the conditions for companies dealing with CADE. Part of this diagnosis resulted from the low expectations created by a negative record regarding the managerial results of the competition protection bodies. These results showed that analysis took an excessive amount of time—sometimes longer than two years.¹³ The other part of the diagnosis came from the staffing problems of the new body.¹⁴

SBDC's incapacity to deal with the ever-growing stock of mergers was notorious on top of its mission to fight off cartels and unilateral activi-

7. *Falta de pessoal ameaça início de funcionamento do Supercade [Lack of Personnel Threat Early Preparation of the Super-CADE]*, O GLOBO (Apr. 22, 2012), <http://oglobo.globo.com/economia/falta-de-pessoal-ameaca-inicio-de-funcionamento-do-super-cade-4711776>.

8. Patrick Cruz, *Lei da concorrência veio para facilitar e complicou [Competition law came to help and complicated]*, EXAMEN (June 13, 2012), <http://exame.abril.com.br/revista-exame/edicoes/1018/noticias/lei-da-concorrencia-veio-para-facilitar-e-complicou?page=3>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. OECD, *supra* note 2, at 41.

14. OECD, *supra* note 2, at 47.

ties.¹⁵ In regards to the mergers, there lacked a clear policy in order to deal with the ordering of the mergers that were presented due to the growing stock and the reduced number of technicians.¹⁶ Even after the adoption of the fast track procedure in 2000, which provided an additional life span to the old system with considerable gains in productivity, the stock or mergers would not stop growing.¹⁷ Therefore, the logic was basically to administer the increasing volume of stock, rather than the income and outcome flow of mergers.¹⁸

This paper aims to detail the creation process of managerial solutions, which culminated in new CADE's positive performance during its first two years. We will demonstrate the path designed by its employees, starting with the approval procedure of Law 12.529/2011, including the description of structural changes and the transition work. Then, we will describe the managerial solutions developed, in order to ultimately achieve the results that were obtained.

II. THE TRANSITION TO THE NEW COMPETITION LAW

In 2005, the Brazilian Government forwarded to the National Congress Bill 5.877, which intended to restructure the Brazilian Competition Protection System. Generally speaking, it established the unification of the bodies of the system and the adoption of the pre-merger thresholds.¹⁹ In 2007, the bill regarding the restructuring of the competition protection policy was included as one of the priorities of the January 22nd Growth Acceleration Program (PAC), instituted by Decree 6.025.²⁰ After that inclusion, the restructuring of SBDC became a priority.

Two years after its inclusion in the PAC, the project of restructuring of the Brazilian competition protection policy was approved by the House of Representatives.²¹ A year later, it was approved by the Senate.²² Finally it was definitively approved by the House of Representatives on October 5, 2011.²³ Law 12.529/11 was enacted by the president a little

15. The management changes related to this point are based on Chapter 1—Strategic Planning and Prioritisation—of the International Competition Network (ICN)'s Competition Agency Practice Manual. See INT'L COMPETITION NETWORK, AGENCY EFFECTIVENESS: COMPETITION AGENCY PRACTICE MANUAL, 25 (2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf>.

16. See OECD, *supra* note 2, at 77.

17. *Id.* at 78.

18. *Id.*

19. Lei No. 5.877/05, de 12 de Setembro de 2005, CÂMARA DOS DEPUTADOS de 9.12.2005 (Braz.).

20. See Decreto No. 6.025, de 22 de Janeiro de 2007, D.O.U. de 22.1.2007 (Braz), available at http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2007/Decreto/D6025.htm.

21. See generally Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011 (Braz.).

22. See *id.*

23. See *id.*

less than two months after, on November 30, 2011.²⁴ During this time period, there was much debate, many agents were involved, and various modifications were made to Bill 5.877/2005.²⁵ But the basic backbone was kept intact; namely, the institution of the system of *ex ante* analysis of mergers and the joinder of the tasks of the three bodies of the SBDC into a single body, which would keep the former name CADE but would present a structure more compatible to current challenges.²⁶ Below is a brief discussion of the changes that had a significant impact on the new antitrust model.

A. STRUCTURAL CHANGES IN THE COMPETITION PROTECTION MODEL

As previously mentioned, one of the main changes was the transformation of the *a posteriori* control of the mergers to a prior control, which is one that prevents companies from closing their transactions before CADE's approval.²⁷ With this change, the imposition of measures that restrict competition were more easily implemented and less traumatic to the economy as a whole. Further, it placed the competition protection policy in a more equalitarian position with the main jurisdictions of the world, which also facilitated the cooperation in the handling of international transactions.²⁸

The model's other fundamental change was the joinder of tasks of the three Brazilian antitrust bodies in the new CADE. SDE was terminated and replaced within the structure of the Ministry of Justice by the Na-

24. CONSELHO ADMINISTRATIVO DE DEFENSE ECONÔMICA [ADMIN. COUNCIL FOR ECON. DEF.] (CADE), DEFENSE DE CONCORRÊNCIA NO BRASIL: 50 ANOS [COMPETITION POLICY IN BRAZIL: 50 YEARS] 139 (2013), available at http://www.cade.gov.br/publicacoes/livro/CADE_-_DEFESA_DA_CONCORRENCIA_NO_BRASIL_50_ANOS.pdf; see generally Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011 (Braz.), available at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12529.htm.

25. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA [ADMIN. COUNCIL FOR ECON. DEF.] (CADE), DEFESA DA CONCORRÊNCIA NO BRASIL: 50 ANOS [COMPETITION POLICY IN BRAZIL: 50 YEARS] (2013), available at http://www.cade.gov.br/publicacoes/livro/CADE_-_DEFESA_DA_CONCORRENCIA_NO_BRASIL_50_ANOS.pdf.

26. See generally Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011 (Braz.).

27. OECD, *supra* note 2, at 78.

28. After Law 12.529/11 came into force, CADE considerably increased its interaction with the world's most important antitrust agencies. Some international merger reviews were carried out together with foreign agencies, which led to a significant exchange of information and ideas including discussions on the necessary remedies to be adopted in order to reduce the potential negative impact of the mergers on competition. Some examples of this new phase were the following cases: Merger Review No. 08700.006437/2012-13 (Syniverse Holdings e WP Roaming III) and Merger Review No. 08700.009882/2012-35 (Munksjo AB and Ahlstrom Corporation). Both cases were approved by CADE's Tribunal following the parties' signing of commitments (ACC), and after extensive information exchange between CADE and the European Commission. For copies of these decisions, see *Sei*, CADE, http://sei.cade.gov.br/sei/institucional/pesquisa/processo_pesquisar.php?acao_externa=protocolo_pesquisar&acao_origem_externa=protocolo_pesquisar&id_orgao_acesso_externo=0 (last visited May 8, 2015).

tional Consumer Secretariat, which could also be considered a positive aspect of the new law because it strengthens a very relevant policy for society.²⁹ Seae remained as a part of SBDC, but with a role devoted only to competition advocacy due to its performance over the last few years.³⁰ This change aimed mostly at extinguishing what was formerly known as the “three counters” of SBDC.³¹ In order to clear a merger in Brazil, the companies had to wait for the approval by three distinct bodies, which were physically separated and had frequent communication problems, requiring double efforts.³²

After Law 12.529/11, the tasks performed by the former Seae (except for the competition advocacy) were incorporated to a new body called CADE’s General-Superintendence (GS).³³ This body, which will be the focus of the present work, also gained an attribution that plays a very relevant role in the new model adopted by the new Brazilian antitrust legislation—the power to review and decide on the transactions where there is no need for the application of competitive restrictions (i.e., ones that have no chance of having negative impacts on prices and/or quality in Brazil).³⁴ On the other hand, all the mergers that have some kind of restriction suggested by the GS must be ruled on by CADE’s tribunal³⁵ and the administrative tribunal, which investigates breaches in the economic order and offer recommendations for filing or conviction.³⁶

Hence, the more relevant cases, which in a way contribute to the definition of the competition protection policy, are defined in the ruling sessions of the administrative tribunal. The Tribunal then becomes essentially a judicial body, which determines CADE’s case law and the country’s competition protection policy, leaving the reproduction of instructions behind.³⁷

Another legal innovation created by the new Brazilian competition law—a requirement which makes the submission to CADE of a given merger mandatory—also deserves attention in this paper. Under Law

29. José Gabriel Navarro, *Governo federal cria a Senacon [Federal government creates Senacon]*, JORNAL DA TARDE (May 31, 2012, 6:59 AM), <http://blogs.estadao.com.br/advogado-de-defesa/governo-federal-cria-a-senac/>.

30. OECD, *supra* note 2, at 79.

31. See Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 4 (Braz.).

32. Cruz, *supra* note 8.

33. OECD, *supra* note 2 at 57.

34. Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 13 XII, art. 54 I, art. 57, I (Braz.).

35. Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 13 XII and art. 57 II (Braz.).

36. Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 13 VII-VIII (Braz.).

37. CADE’s Tribunal is active in all the administrative proceedings opened to investigate anticompetitive conducts and all mergers contested by the GS. But the Tribunal has the power to arrogate any merger approved by the GS. See Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art 65 II (Braz.); Resolução No. 1, de 29 de Maio de 2012 D.O.U. de 31.5.2012, art. 122 II (Braz.), available at [http://cade.gov.br/upload/Resolucao%201_2012%20-%20RICADE%20\(2\).pdf](http://cade.gov.br/upload/Resolucao%201_2012%20-%20RICADE%20(2).pdf).

8.884/94, the submission of any transaction which involved an economic group with gross revenues of more than R\$400 million in the year prior to the transaction, with rare exceptions, was considered to be mandatory.³⁸ This resulted in the overcrowding of SBDC with transactions that were mostly fairly simple from a competition standpoint. Needless to say, the mandatory character represented a considerable waste of both public and private resources, which resulted in inefficiency.³⁹ After Law 12.529/11 was enacted, only the submission of transactions that involve an economic group with gross revenues greater than BRL 750 million and at least one more group with a gross revenues over BRL 75 million are considered to be mandatory.⁴⁰

Along with this innovation, which helped to drastically reduce the number of mergers presented to CADE, came another equally important creation, namely the possibility of regulating the mandatory notification thresholds upon indication by the CADE's tribunal, followed by a joint ordinance from the Ministries of Economy and Justice. This measure was adopted after the first day of effectiveness of Law 12.529/11 (May 30, 2012) with Interministerial Ordinance MF/MJ 994/12, elevating the figures of its mandatory filing thresholds (established in its article 88) to R\$750 million and R\$75 million.⁴¹

Finally, one has yet to emphasize the rules brought by the new law in regards to the rejection of notifications, via amendment. This point is of great relevance because it encourages the parties in a transaction to present all the information referring to it at the first opportunity, under penalty of rejection and amendment (which can only happen once) by the General-Superintendence. The amendment is the only time in the review procedure of a merger when its review term is interrupted and reinitiated because the information initially presented was considered to be insufficient for a decision by the General-Superintendence.⁴² Therefore, only when the parties notify CADE about the answer to such an amendment, does the review term begin again.⁴³ Furthermore, in the event the answer to the amendment is not accepted by the General-Superintendence because it still contains defects and irregularities capable of hindering the judgment of the merits, the penalty will be the filing of the proceedings without the analysis of the merits.⁴⁴

38. Lei No. 8.884/94, de 11 de Junho de 1994, D.O.U. de 13.6.1994, art. 54, ¶ 3 (Braz.) (which was overhauled by Lei No. 12.529/11).

39. See OECD, *supra* note 2, at 7.

40. *Id.*

41. See Portaria Interministerial No. 994, de 30 de Maio de 2012, GABINETE DO MINISTRO de 30.5.2012 (Braz.), available at <http://www.cade.gov.br/upload/Portaria%20994.pdf>.

42. *Id.*

43. *Id.*

44. Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 53, ¶ 1 (Braz.); see also Resolução No. 1, de 29 de Maio de 2012, D.O.U. de 31.5.2012, art. 111 (Braz.).

Before proceeding to the next topic of this paper, it is important to mention that the mistrust in the new CADE was clearly demonstrated by the market's level of tension soon after the enactment of Law 12.529/11. And this level of tension was externalized by the media, as shown in some examples already discussed.⁴⁵ The most interesting part is that all of this negative news was published not only after the promulgation of Law 12.529/11 (some even after its coming into force), but also after the publication of all of CADE's main infralegal regulations.⁴⁶ This signals that the market had a great mistrust of the new CADE's management ability. After all, even though the structural improvements were evident, they could be deemed innocuous without adequate management. Nevertheless, as will be demonstrated, the work was already being developed way before these critics, trying to anticipate the main challenges to come.

B. TRANSITION WORKS FOR LAW NO. 12.529/2011

Soon after the approval of SBDC's restructuring project by the Senate, and its forwarding to the House of Representatives for the final deliberation, President Dilma Rousseff took office.⁴⁷ After the initial concern over the degree of priority that would be given to this project by the new president, the Minister of Justice, José Eduardo Cardozo, confirmed the new government's support of the project's approval.⁴⁸ Therefore, the leadership of the SBDC (in particular SDE and CADE) decided to initiate the preparation for the changes at the beginning of 2011. There was much that needed to be discussed, from the infralegal framework that would have to be created, to the budget and personnel issues, the new physical structure, organizational charts, the compatibilization of different organizational cultures in a single body and, perhaps one of the main points, how to make the new system of prior analysis of mergers work in such a way so as to not frustrate the expectations surrounding the new Brazilian competition protection system.

The preparation for the transition process was then initiated. It was thought that the process could unravel at any time because the six month period of *vacatio legis* would hardly be enough to solve all the issues in a satisfactory manner. Hence, CADE's commissioners and employees, besides SDE's and Seae's employees—which would be incorporated to the

45. See *A Champion for Choice?*, *supra* note 1.

46. See generally Cruz, *supra* note 8; see also Molan Gaban & Juliana Oliveira Domingues, *Nova Lei permitirá a criação de monopólios [New law will allow the creation of monopolies]*, FOLHA DE SÃO PAULO (July 8, 2012), <http://www1.folha.uol.com.br/fsp/opiniao/53304-nova-lei-permitira-a-criacao-de-monopolios.shtml> (an example of this negative news).

47. *Dilma Rousseff sworn in as Brazil's new president*, BBC NEWS (Jan. 1, 2011, 10:17 PM), <http://www.bbc.com/news/world-latin-america-12103312> (providing President Dilma Rousseff was sworn into office on January 1, 2011, succeeding Luís Inácio Lula da Silva).

48. Gilberto Costa, *Para Ministro da Justiça novo CADE deve acelerar tramitação de processos de defesa concorrencial*, AGÊNCIA BRASIL (Oct. 6, 2011, 1:35 PM), <http://memoria.ebc.com.br/agenciabrasil/noticia/2011-10-06/para-ministro-da-justica-novo-cade-deve-acelerar-tramitacao-de-processos-de-defesa-concorrencial>.

new antitrust body, according to the provisions in the bill—were distributed in six groups, supervised by CADE's commissioners. These six groups were entrusted with the task of discussing, analyzing, and proposing actions to facilitate the transition. Therefore, in the first semester of 2011, the transition groups for the preparation of the "New CADE" were formed.

The six groups were (a) the New Headquarters, responsible for evaluating the demand for a physical space that would accommodate the increase in the number of staff members and the peculiarities of the activities to be conducted; (b) Structure and Organizational Chart, which studied the structure of the positions, offices, and people that would be necessary in order to fulfill the new competences, including the functioning of the General-Superintendence, the Economic Study Department, and the Federal Attorney's Office, together with CADE's Tribunal; (c) Information Technology, created to identify technologic solutions that are more efficient and more adequate to new CADE; (d) *Infralegal Rules*, responsible for reviewing the existing rules, including new ones and editing the Internal Regulations; and (e) Mobilization and Alignment, entrusted with the task of motivating and boosting the participation of all employees in the transition work, as well as providing the exchange of information between the groups by means of newsletters.⁴⁹

Besides the ones mentioned above, the pre-merger review group was also created and tasked with identifying the best competition protection practices at an international level. This group can be considered as the most important for the implementation of the new model, and it will be explained in detail below. Its main results were (i) the structuring of the General-Superintendence; (ii) the new information forms for the notification of mergers, creating specific forms for fast track and ordinary pro-

49. The main results of each transition group were the following: (a) New Headquarters: renting of headquarters in the end of Asa Norte, in Brasília, which could accommodate the new employees incorporated from SDE and Seae; (b) Structure and Organizational chart—the task of this group was to study the necessary structure for the new CADE, which would receive the tasks previously performed by SDE and Seae, and create an organizational chart of the whole organization which had to reflect both the new tasks and the new procedural flows. This group had a strong interaction with the pre-merger analysis group, aiming at reflecting the new flows created in the institutional design of the new CADE; (c) Information Technology: the primary task of this group was to study several possibilities of new systems presented, aiming at providing the new CADE with an informational system capable of satisfying both the internal public and the external one. This system is currently under development, but it is partly functioning; (d) *Infralegal Rules*: this group delivered as a main product CADE's new Internal Regulations, performing great revision work of both the old Regulations and the *infralegal rules* of the former SBDC's two Secretariats, which needed to be adapted to the new system; and (e) Mobilization and Alignment: this groups played a fundamental strategic role in the formation of the new CADE, in the sense that it sought to align all the expectations of employees from the three bodies with what was being done by the six transition groups. The open communication between the managers and the employees, with regular presentations in CADE's Plenary, directed to everyone, was crucial for the motivation process of SBDC's employees, reducing the resistance to change, common in these scenarios.

ceedings; (iii) a Resolution by CADE (Resolution 02/2012) aimed at regulating the new procedure of prior analysis of mergers, also specifying new criteria for submission; and (iv) the definition of the new procedural workflow within the General-Superintendence.⁵⁰

C. THE WORK PLAN OF THE PRE-MERGER REVIEW TRANSITION GROUP

In the first semester of 2011, several meetings with Brazilian and foreign lawyers that worked along with CADE were conducted.⁵¹ They tried to identify the main deficiencies present and confirmed CADE's diagnosis. Along with these meetings with the main agents of Brazil's anti-trust policy, the pre-merger group initiated benchmarking studies with the best international practices related to the system of *ex ante* analysis of mergers.⁵² First, twenty questionnaires were sent to foreign authorities, with questions related to the functioning of their respective pre-merger systems, such as regulations adopted, organizational structures, information level required in notification forms, deadlines, procedural flows, etc.⁵³ Some of the twenty consulted agencies responded to the inquiry performed by CADE.⁵⁴

After these initial consultations, part of the pre-merger group set *in loco* interviews with authorities from some agencies that were chosen for technical reasons (i.e., their notorious expertise in competition protection) and also for strategic reasons because some of the chosen agencies had recently undergone similar transition procedures.⁵⁵ It was not possible to import a ready-made model, without adaptations to the Brazilian reality, in particular because of the inequality between the number of technicians available at these agencies and the number of analyses of mergers performed each year.

After the pre-merger transition team concluded that all of the products they had envisaged in their initial project, which was delivered on January 31, 2012 (almost four months before the new law would come into force), they were presented for validation and adjustments to all other teams, as well as to the leaderships in both CADE and SDE.⁵⁶ The products and

50. ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA [NATIONAL SCHOOL OF PUBLIC ADMINISTRATION], AÇÕES PREMIADAS NO 18º CONCURSO INOVAÇÃO NA GESTÃO PÚBLICA FEDERAL-2013 [AWARDED SHARES THE 18TH CONTEST INNOVATION IN MANAGEMENT FEDERAL PUBLIC-2013] 179 (Pedro Luis Costa Cavalcante, et al. eds., 2013), available at http://www.enap.gov.br/images/livro_acoes_premiadas_18_concurso.pdf [hereinafter ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA].

51. *Id.* at 189.

52. *Id.*

53. *Id.*

54. For instance, Australia, Canada, Denmark, Spain, France and United States of America. See *id.*

55. Lauro Jardim, *O CADE vai à Europa [CADE going to Europe]*, VEJA (Jan. 6, 2012, 5:54 PM), <http://veja.abril.com.br/blog/radar-on-line/governo/o-cade-vai-a-eurola>.

56. *Dirigentes do SBDC elaboram proposta de novo Regimento Interno [SBDC Leaders Prepare Proposed New Bylaws]*, CONSELHO ADMINISTRATIVO DE DEFESA

main results of each team were presented at seminars organized in places outside the headquarters of the referred bodies in two phases.⁵⁷ During the seminars, each point of the products was discussed, through individual presentations, followed by a debate. The key objective of these encounters was to validate the main products developed during the transition phase, in order to present them to the Brazilian society by means of public inquiries.⁵⁸

The main product developed by the pre-merger team which was subjected to a public consultation was the Resolution that would regulate the mergers, including the two notification forms (fast track and ordinary proceedings), as well as its annexes.⁵⁹ Hundreds of contributions were received during the public consultation process—many of them have been incorporated into the final versions of the texts—and were all duly answered. The participation of the major national agents and even of some international ones, such as the American Bar Association, was of great value to the development of the regulation which gave rise to CADE's Resolution 02/2012, as soon as Law 12.529/11 first came into effect.

III. THE MANAGERIAL INNOVATIONS INSERTED BY CADE

After all the above mentioned, the structural changes promoted by the new Brazilian antitrust law would not be enough to guarantee, on their own, the good functioning of the new pre-merger system.⁶⁰ With time, it became clear to the transition group responsible for thinking up the new pre-merger model, that a procedural flow focused on a model of prioritizing the proceedings needed to be adopted. This was the only way the new body would be able to overcome the challenge of rendering higher quality analyses of mergers faster and more efficiently.

Moreover, all the inefficiency of the old *a posteriori* control of mergers regime should be completely reversed. This is because a prior control would demand that the decisions of the mergers by the new CADE be conducted quickly enough in order to avoid preventing hundreds of transactions of mergers and acquisitions between companies that occur

ECONÔMICA (CADE), <http://www.cade.gov.br/Default.aspx?c97d8d9c74a97e8591be8ed969ee> (last visited Nov. 7, 2014).

57. The first seminar was held on February 1, 2012, and the second between February 27 and March 2, 2012, both at the Israel Pinheiro Convention Center, in Brasília. *See id.*

58. *See id.*

59. These two filing forms were published for public consultation by CADE on March 2012. *See Consultas Públicas Concluídas*, CADE, <http://www.cade.gov.br/Default.aspx?62d524f50f04181bef5def471f21> (last visited Nov. 7, 2014).

60. As previously said in item 2.1 of this paper, the new Brazilian antitrust law solved part of the structural problems, for example, reducing the inefficiency generated by the “three counters” by transforming them into one single body and all the costs derived from this system, and also creating one more threshold to be considered for the prior notice of mergers.

annually in Brazil.⁶¹ Therefore, the success of the new CADE depended on innovative managerial solutions in order to overcome the operational difficulties of a pre-merger system.

The managerial problem was diagnosed based on the whole work plan of the pre-merger group. The administration of mergers is difficult because it requires the organization of procedures with different complexity levels that consequently require different levels of work within an administrative body such as CADE. This difficulty derives not only from CADE, but also from the companies' representatives who submit their mergers, leading to a volume of necessary information varying according to the complexity level of the transaction. In the previous model, the cases were essentially analyzed based on a "first come, first serve" approach, causing more complex cases to block the analysis of the majority of simpler ones.⁶²

The central theme of the managerial innovations developed by the pre-merger group was and continues to be to transform the system into a continuous flow of analysis to avoid any interruptions in one of the units of the General-Superintendence.⁶³ In order to transform the administration of the proceedings, it would first be necessary to organize the entry of these proceedings into the General-Superintendence. This led to the following managerial innovations introduced into CADE's General-Superintendence.

A. CREATION OF A SPECIFIC SECTOR FOR THE TRIAGE OF MERGERS

Initially, the pre-merger transition group had to plan the new procedural flow within the General-Superintendence and decide the ideal organizational structure in order for this flow to work in an efficient manner, despite the scarce resources and slim chances of solution until the start of the body.

A key element adopted by the General-Superintendence was the creation of the Triage sector, which continues to be tasked with identifying all cases that clearly do not raise competition concerns and deciding those

61. See *Statistics*, INST. OF MERGERS, ACQUISITIONS AND ALLIANCES, http://www.imaa-institute.org/statistics-mergers-acquisitions.html#MergersAcquisitions_Brazil (last visited Nov. 7, 2014).

62. See Laura Naime & Ligia Guimarães, *Conheça os passos para aprovar ou rejeitar a fusão Sadia-Perdigão* [Learn the steps to approve or reject the merger Sadia, Perdigão], GLOBO—SÃO PAULO (May 20, 2009), at G1, available at http://g1.globo.com/Noticias/Economia_Negocios/0,,MUL1161471-9356,00-CONHECA+OS+PASSOS+DO+CADE+PARA+APROVAR+OU+REJEITAR+A+FUSAO+SADIAPERDIGAO.html; see also Daniela Barbosa, *Caso Sadia-Perdigão pode acelerar mudança na lei das fusões e aquisições* [Sadia, Perdigão case can accelerate change in the law of mergers and acquisitions], EXAME (June 9, 2011, 6:00 AM), <http://exame.abril.com.br/negocios/noticias/caso-sadia-perdigao-pode-acelerar-mudanca-na-lei-das-fusoes-e-aquisicoes>; see also Bruno Boris, *CADE—decisão que reprovava compra da Garoto pela Nestlé* [CADE-decision disapproves purchase of Garoto by Nestlé], MIGALHAS (Feb. 13, 2004), <http://www.migalhas.com.br/dePeso/16,MI3649,71043-CADE+decisao+que+reprova+compra+da+Garoto+pela+Nestle>.

63. ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50, at 191.

cases within thirty days.⁶⁴ This deadline was created by the leaderships of the new CADE. Because more than 600 approvals using the fast track procedure were made within thirty days, it is highly probable that this is going to be incorporated into the body's Internal Regulations following CADE's last regulation review.

The creation of a general department was a result of the fact that the ratio of proceedings per technician is higher in Brazil than in many other main foreign authorities.⁶⁵ This department was designed to "separate the wheat from the chaff" or, more specifically, to separate the cases with less potentially offensive effects on competition (a procedure called fast tracking) from the cases that could negatively impact the competitive environment.⁶⁶ This new institutional design broke up the structure adopted in the previous model of a *posteriori* review. Even though the fast track procedure has existed since the mid-2000s, none of three bodies of the former SBDC had a specific sector for such an activity.

The use of two notification forms (one for fast track procedures and the other for all other cases) helped the congestion of the Triage sector. It comes down to a self-identification mechanism, which is one of the

64. *See id.*

65. According to the information found in the annual reports of some of the world's most important antitrust agencies, in 2012, while CADE reviewed 660 cases with the assistance of eighty-seven public servants (average of 7.58 cases per public servant), France reviewed 2013 with the assistance of ninety-nine public servants (average of 2.15 cases per public servant), Spain reviewed 113 cases with 106 public servants (average of 1.06 public servants per case), Canada reviewed 232 cases with 282 public servants (average of 0.82 cases per public servant), and the United States of America reviewed 1,166 cases with the assistance of 722 public servants (average of 1.61 cases per public servant). *See* MINISTÉRIO DA JUSTIÇA [MINISTRY OF JUSTICE], PRESTAÇÃO DE CONTAS ORDINÁRIA ANUAL: RELATÓRIO DE GESTÃO DO EXERCÍCIO DE 2012 [PROVISION OF REGULAR ANNUAL ACCOUNTS, ANNUAL REPORT FOR THE YEAR 2012], available at http://www.cade.gov.br/upload/Relat%C3%B3rio%20de%20Gest%C3%A3o%20de%202012_CADE_vers%C3%A3o%20final.pdf; *see also* AUTORITÉ DE LA CONCURRENCE, PUSHING THE BOUNDARIES FOR A STRONG AND FAIRER ECONOMY: ANNUAL REPORT SUMMARY 2012, available at http://www.autoritedelaconcurrence.fr/doc/synthese_2012_en.pdf (providing France reviewed 2013 with the assistance of ninety-nine public servants); *see also* COMISION NACIONAL DE LA COMPETENCIA, ANNUAL REPORT: 2011-2012, available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=186694&Command=Core_Download&Method=attachment (providing Spain reviewed 113 cases with 106 public servants); *see also* COMPETITION BUREAU CANADA, ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2012, [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-doc-ar-2011-12-e.pdf/\\$file/cb-doc-ar-2011-12-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-doc-ar-2011-12-e.pdf/$file/cb-doc-ar-2011-12-e.pdf); *see also* FEDERAL TRADE COMMISSION, THE FTC IN 2012, http://www.ftc.gov/sites/default/files/documents/reports_annual/ftc-2012/ftc-highlights-2012.pdf (last visited Apr. 25, 2015).

66. The first time that the triage system was discussed with the international legal community was in the Merger Enforcement in The Americas Conference, which was held on by the New York State Bar Association Antitrust Law Section, in conjunction with the International Section of the NYSBA, the Brazilian Institute on Competition, Consumer Affairs, International Trade (Ibrac) and the Canadian Bar Association, in New York on July 17, 2012. *See Remarks by Melanie L. Aitken, Commissioner of Competition*, COMPETITION BUREAU, July 17, 2012, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03494.html>.

ways to organize the queue (commonly used in customer service systems). In case the company presents an ordinary case as a case for the fast track procedure, it bears the risk of having its case amended and ultimately rejected if there is a lack of necessary information.⁶⁷ This possibility of amendment and rejection discourages companies from supplying misleading or incomplete information, leading to a more efficient Triage sector.⁶⁸

The Triage department is the core of the General-Superintendence's intelligence and its role is to create and foster new management techniques and substantive reviews of the mergers that are filed with CADE. Because it receives all the mergers submitted to CADE, monitors transactions that are occasionally not presented (whether mandatory), and centralizes all the questions citizens may have regarding legal and infra-legal rules that regulate CADE's performance, the Triage department is central to the pre-merger review. Furthermore, because it possesses a broader vision of all the cases presented and of all the doubts already answered, the Triage department serves as a communication bridge between the Brazilian antitrust community and the General-Superintendence.⁶⁹

B. CREATION OF CGS, SPECIALIZED IN GROUPS OF SECTORS BASED ON A "SCALE/SCOPE" LOGIC

The creation of a Triage sector was not the only managerial innovation in terms of institutional design. The whole structure of the General-Superintendence was developed to function organically, favoring scale and scope gains with specialized departments (or " coordinations ") in different sectors of the economy. It also benefits not only from the accumulated expertise both in regard to the review of mergers and to abuse of dominance cases (another break from the previous system's structure),

67. Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.20113, art. 53 (Braz.).

68. The companies, motivated by a system of *a posteriori* analysis, which did not prevent the conclusion of the intended transaction, made little efforts to present their merger in a complete form with all necessary information for a correct analysis. To the contrary, in cases that were notably more complex, it was obvious that the parties intended to initially present the minimum amount of information possible, submitting additional information as it was required by SBDC's bodies, through information requests, which suspended the legal term imposed by Law 8.884 (30 days for each Secretariat and 60 days for CADE, with the possibility of interruption upon any request for supplementary information, both to the parties and to third parties). After all, the longer the analysis, the more difficult it would be to implement conditions for its approval, or even failure. This negative incentive generated by the *a posteriori* analysis system also existed for the SBDC's employees who, pressured by the huge amount of transactions submitted and by the extremely short legal term, did not evade from sending requests for information, which were sometimes, unnecessary to the analysis.

69. Since the enactment of the new competition law, the Triage has been mainly at the service of antitrust law, basically answering questions on whether a given transaction is of mandatory filing with CADE, as well as questions on whether a given transaction can benefit from the fast-track proceeding.

but also from the constant exchange of information between the departments.

The creation of those specialized departments was based on empirical work (CGAA 1 to 4).⁷⁰ Indexes with some variables⁷¹ were created based on all the mergers (not fast tracked) reviewed by the Seae/MF between 2007 and 2011, as well as, on the stock of administrative proceedings (except for cartels) from SDE/MJ in the beginning of 2012. These indexes were aimed at evaluating the “good stock” for each of the new departments of the GS by analyzing this stock both according to the amount of acts expected for each sector allocated in the departments and their degree of difficulty. The indexes also consider the possible scale and scope gains resulting from these divisions; analyzed both in terms of analysis of mergers and of unilateral behaviors.

Because all of the general departments have the same legal competence, there is a constant exchange of technicians between them whenever there is the necessity for a task force in a certain case, or even for a temporary reinforcement in a certain sector. This flexibility in the institutional design also allows the structure of the General-Superintendence to more easily adapt to the changing economy, enabling the technicians to also adapt to the demand. It is important to highlight that the “scale/scope” logic in the formatting of general departments of the General-Superintendence is aligned with the organization of the line of mergers to render the flow of analysis more efficient.⁷²

C. CREATION OF WORK FLOWS BASED ON DIFFERENT DEGREES OF COMPLEXITY

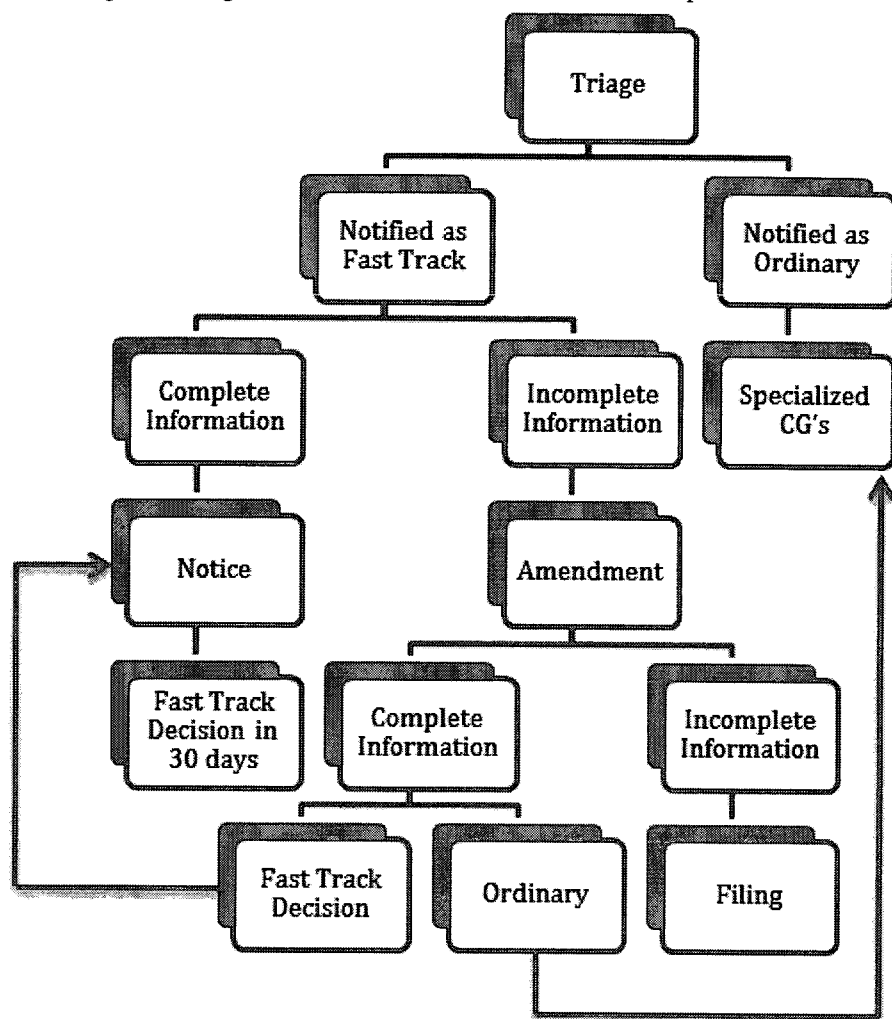
The two previous innovations relate to the Triage department’s structure, as well as the creation of the sectorial departments (with the help of the two form models) and the goal of transforming stock into continuous flow of analysis is summarized in Image 1 (below). It also reflects the different treatment given to different degrees of complexity of the transactions presented to CADE.

70. ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 48, at 192–93.

71. For instance, average analysis time, average analysis time by sector, amount of cases analyzed by sector, amount of restrictions suggested by Seae per sector etc. *Id.*

72. *Id.*

Image 1—Mergers flow in the CADE's General-Superintendence



The Triage department receives all the mergers and makes a first assessment, in order to verify if all the information and documents presented are enough for the start of the actual proceeding analysis.⁷³ After this, the transaction's notice is published in the Official Federal Gazette, as well as on the CADE's website to give publicity of the transaction to third parties.⁷⁴ But if the merger is ordinary (not subject to the fast track procedure), then the Triage department forwards the proceeding directly to the general department responsible for its review. Initially, this department will verify if all the information submitted is enough;

73. *Id.* at 193.

74. See Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.20113, art. 53 (Braz.).

then it will go through all the stages of an act submitted under the fast track procedure, as described Image 1. Afterwards, the department performs all necessary market tests, and, as the review progresses, it can request more information from the parties. Regarding the mergers submitted under the fast track procedure, if the Triage department believes that there is a lack of information for the start of the merger review, then it can try to clarify through direct questions to the parties via letters or phone calls. If the lack of information is essential for the continuation of the case, then the Triage department can opt for an amendment.

After clarifying the questions during the initial proceeding of the analysis,⁷⁵ the Triage department decides, together with the specialized coordinator responsible for the review in the specific sector of the transaction submitted and the Adjunct Superintendent, whether to proceed with the review under the fast track procedure or to forward the transaction for review under the ordinary procedure by the respective specialized department. In the latter case, the decision by the GS to not grant the fast track procedure to a transaction is discretionary.⁷⁶ This only means that the GS was not convinced, even after clarifications provided by the parties and third parties, that the transaction potentially has a less severe impact on competition; therefore, it requires a greater scrutiny by its team. In some specific cases, even before the publishing of its notice, the Triage department may request a waiver from the parties,⁷⁷ which allows the GS to ask for information from third parties or other international antitrust authorities upon authorization by the parties. The waiver, also used by the other departments responsible for the ordinary acts, aims to speed up the review before it is published via notice, especially in cases that raise relevant questions, even if submitted under the fast track procedure.

These procedures aim to speed up the review term in one of two ways: (1) through fast track procedure, which adheres to the thirty day dead-

75. This initial process does not necessarily refer to the procedures performed before the publication of the notice. In some cases, the Triage may publish the notice, if it understands that the parties have presented all the information available to them to enable the start of the analysis of the transaction in the GS after diligences with third parties (competitors, clients, suppliers etc.), it may decide, together with the specialized coordination and the Adjunct Superintendent, not to continue the analysis of this transaction under the fast track procedure in case the diligences performed have not made clear the irrelevance of the transaction in competition terms or even if these diligences have brought new doubts about the transaction. In these cases, which are an exception to the rule, the GS determines, through an order, that the transaction be changed to the ordinary procedure, and that new information be requested.

76. Resolução No. 2, de 29 de Maio de 2012, D.O.U. de 5.31.2012, art.7 (Braz.), available at http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20An%C3%A1lise%20Ato%20Concentra%C3%A7%C3%A3o.pdf.

77. Although CADE has not specifically regulated this issue, the waivers were adopted based on the best practices of the world's top antitrust agencies. This instrument has been used in several cases with international repercussions. See No. 08700.006437/2012-1 Ato de Concentração, *supra* note 26; No. 08700.009882/2012-35 Ato de Concentração, *supra* note 26.

line, starting from the day of submission of the act to CADE; or (2) under ordinary procedure, under which the deadline depends on its level of complexity, even though it is legally limited to 240 days with restricted possibilities of extension.⁷⁸

D. INSTITUTION OF THE “PRE-SUBMISSION” PHASE

Inspired by successful experiences in international antitrust authorities, the transition team of the pre-merger group suggested the inclusion of a provision in CADE’s Internal Regulations⁷⁹ aiming at establishing prior meetings for the mergers that are not eligible for the fast track procedure. These meetings allow the parties to present to the GS the general aspects of the intended transaction, as well as their view of the possible impacts on certain markets. This whole process is conducted in a secretive manner, but in some cases the parties can waive secrecy to allow the authority to access other international authorities or to allow the market to answer questions raised.

Until now, this “pre-submission” phase has been generating positive feedback within the scope of the General-Superintendence. The GS can anticipate its first impressions of the transaction and information presented up to that moment, avoiding, in the majority of cases, delays by lack of information at the time of notice of the transaction to CADE because it is in possession of the main aspects of the transaction, or in many cases of a draft of the Annex 1 form of CADE’s Resolution n. 02/12. The main purpose of this stage is precisely to guarantee that the transaction be presented in the most complete manner as possible, considerably reducing the possibility of an amendment. This gain in quality regarding the information of the transactions submitted, resulting from the discussions during the pre-submission phase, have greatly contributed to faster review terms in these cases.

E. SYSTEM OF “CHECKS & BALANCES”

In order to supplement the flow described above, a system of “checks & balances” was created for all mergers reviewed under the fast track procedure, which currently represent 90 percent of all the analyses ever conducted by the Superintendence. The central idea resides in using the expertise accumulated in the four general departments that deal with ordinary mergers for a counter-check of the analyses undertaken by the

78. In May 2014, the average term of analysis of a merger in the GS was sixty-seven days. In sixty-three cases already examined under the ordinary procedure in the GS, ever since the new law has come into force, the biggest term was 184 days, related to a transaction challenged in the Tribunal (CA n. 08700.006437/2012-13), and that was decided through a commitment (ACC-Concentrations Control Agreement). See ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50.

79. See Regimento Interno Do Conselho Administrativo de Defesa Econômica [The Internal Rules of the Board Economic Defense] de 07 de outubro de 2014, art. 114 (Braz.).

Triage's department under the fast track procedure. Additionally, this flow allows these departments to constantly exchange experiences of their analyses, facilitate the internal communication, and grant more quality and legal certainty to the GS's decisions.

This system works in the following way: after the development of the opinion on a transaction under the fast track procedure by a technician in the Triage's department, the opinion is evaluated by its general coordinator. Then, the Triage's general coordinator submits its fast track opinion for a revision by the general coordinator responsible for the analyses in the economic sector affected by that opinion. When revising the opinion issued by the Triage department, the general coordinator may suggest alterations or supplementations, may give its approval without alterations, and even request new diligences. The coordinator may also determine that the merger is not eligible for the fast track procedure, causing the transaction examined by the Triage department to be more accurately scrutinized for its coordination.⁸⁰ But in case this general revising coordinator gives its approval to the opinion issued by the Triage department, it is then forwarded to the Adjunct Superintendent responsible for monitoring the mergers, who will proceed in a similar fashion as this revising coordinator. Only after the approval of the expedited opinion by the Adjunct Superintendent, is the merger submitted for final approval by the General-Superintendent.⁸¹

IV. RESULTS

The critics were wrong. Past the initial works phase, with the first and very satisfactory results, there was no shortage of compliments to the new CADE's performance. Various national and international publications highlighted the promising start of the new system. The very *Exame* magazine, about three months after its piece that carried heavy criticism, completely reversed the setting, with a long piece praising the start of the new CADE. This piece was titled, "A promising start for the Supercade," with the subtitle "in a little over two months, Supercade has prevailed over the skepticism and makes its debut approving the acquisition of companies in record time. The Brazilian economy says thanks."⁸² But there were also many other pieces complimenting this "promising start" highlighted by *Exame*, with several positive statements by lawyers who

80. See ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50, at 187.

81. It is worth noting that although this internal checks & balances system is not provided for in any specific rule, it was adopted internally by the GS with the purpose of guaranteeing both speed and quality in merger reviews, while encouraging information spill-overs between the departments. This process was based on Chapter 3: Knowledge Management of the Agency Effectiveness Handbook. See generally INTERNATIONAL COMPETITION NETWORK, AGENCY EFFECTIVE HANDBOOK (2013) available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc894.pdf>.

82. See Patrick Cruz, *Um começo promissor para o Supercade [A promising start to the Supercade]*, EXAME (Aug. 9, 2012, 05:55 AM), <http://exame.abril.com.br/revista-exame/noticias/um-comeco-promissor-para-o-supercade>.

work in the field: The Economist, Carta Capital, Reuters, Valor Econômico, among others.⁸³ But which results motivated this change?

A. RESULTS DURING THE TRANSITION TO THE PRE-MERGER MODEL

Before beginning its journey under new legislation and under a new model of pre-merger analysis, as a reflection of all the tension created before Law 12.529/11 and during the final period of submission of cases under the old model (*a posteriori* review, where the parties could conclude the transaction before the approval by CADE), fifteen work days after May 28, 2012, which marked the last day of effectiveness of Law 8.884/94, 141 mergers were presented.⁸⁴ Besides these 141 transactions submitted over a period of less than one month, more than 100 mergers were inherited from Seae without the conclusion of its opinion because this body was no longer in charge of reviewing mergers after the new law came into force.⁸⁵

But the difficulties did not stop there. During this transition period between the two laws, headquarters changed and the adaptation reforms were delayed for about three weeks, leaving the whole body practically without the minimal structural conditions for work. Nevertheless, none of these cases were delayed because the legal term for their analysis started counting from the day of notice, as established in Law 8.884/94, and the deadline would have to be met, with or without the structure.⁸⁶

Right from the beginning, the Triage's department started working, separating all transactions eligible for a fast track treatment from the ones that deserved greater scrutiny. This activity was conducted in about two weeks. With the collaboration of all teams responsible for the review of mergers at CADE, the result could not have been better. All the transactions that benefitted from the fast track procedure (approximately 70 percent) were reviewed by the GS in less than thirty days; until the end of 2012, almost all of the 141 cases submitted had already been examined by the CADE's GS.⁸⁷ In April 2013, the GS's stock of mergers presented under Law 8.884/94 had ended. In May 2014, there were only three mergers, submitted under Law 8.884/94 left for the tribunal's analysis.⁸⁸

In June 2012, mergers started to be filed already under the new pre-merger analysis model. This marked the beginning of the test of the innovations of the new CADE. The results were extremely positive. The first

83. *See id.*; *see also A Champion for Choice?*, *supra* note 1; Por Leonardo Goy, Cade julga mais de 800 casos de fusão e aquisição em 2012 [Cade thinks more than 800 cases of mergers and acquisitions in 2012], REUTERS BRASIL (Dec. 12, 2012, 11:26 AM), <http://br.reuters.com/article/idBRSPE8BB03F20121212>; *Cade julga maior número de casos em um ano [Cade believes more cases in a year]*, VALOR ECONÔMICO (Dec.12, 2012, 7:19 PM), <http://www.valor.com.br/empresas/2938174/cade-julga-maior-numero-de-casos-em-um-ano>.

84. *See generally* ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 48.

85. *See id.*

86. *See* Lei No. 8.884/94, *supra* note 3, art. 54, paras. 6, 7 (repealed 2012).

87. *See* ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50.

88. *See id.*

case approved under the fast track procedure took twenty-seven days.⁸⁹ Right after that, another three cases took less than fifteen days each.⁹⁰ In the first three months of the new CADE, the average term for the analysis of the fast track cases was approximately twenty days.⁹¹ As to the ordinary ones, the success was also immediate. The first one was approved in forty-eight days,⁹² and the second within fifty days.⁹³ In the first six months that Law 12.529/11 became effective, the average term for the review of ordinary mergers was forty-one days.

B. RESULTS AFTER THE TRANSITION FOR THE PRE-MERGER MODEL

Since the new law, the average terms for the fast track cases have continued to stay close to the initial average, even with the significant increase of cases submitted in 2013. But the average terms for the ordinary cases slightly increased mostly due to the degree of difficulty of some of them. Ten of those cases were sent to the Tribunal with a challenge by the GS.⁹⁴ The average term for the ordinary cases between 2012 and May 2014 was approximately sixty-seven days in the GS (eighty-seven days total including review terms of the transactions decided by the Tribunal),⁹⁵ complying with the international standards of leading antitrust agencies in the world.⁹⁶

Below, we show the main statistics from CADE after Law 12.529 came into force, up until May 2014.

89. See Ato de Concentração No. 08700.003962/2012-87 de 09 de julho de 2012 CADE (Braz.), available at http://www.cade.gov.br/temp/D_D000000675581971.pdf.

90. See Barbara Rosenberg, *Brazil: The Enactment of the New Brazilian Competition Law: An Important Shift*, MONDAQ, <http://www.mondaq.com/x/253956/Antitrust+Competition/The+Enactment+Of+The+New+Brazilian+Competition+Law+An+Important> (last updated Aug. 26, 2013). This indicates that the fast track review takes less than thirty days for approval by the CADE.

91. See CA ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50, at 197.

92. See Ato de Concentração No. 08700.006962/2012-39, de 16 outubro de 2012 CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Braz.), available at http://www.cade.gov.br/temp/D_D000000704881564.pdf.

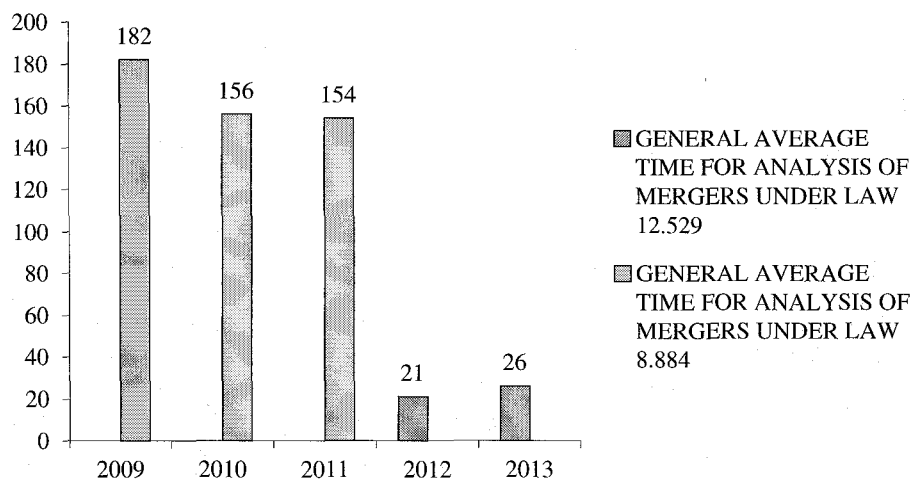
93. See Ato de Concentração No. 08700.005310/2012-87, de 01 de Novembro de 2012 CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Braz.), available at http://www.cade.gov.br/temp/D_D000000708581248.pdf.

94. This figure takes into account the time elapsed between the coming into force of Law 12.529/11 and May 2014.

95. See Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 53 (Braz.); See also Resolução No. 1, de 29 de Maio de 2012, D.O.U. de 31.5.2012, art. 111 (Braz.).

96. See generally Howard W. Fogt, et al, *Timely Merger Clearance Becomes Increasingly Problematic As Complex Rules and Procedures for Required Approvals Spread Around the World*, BLOOMBERG BNA (Aug. 23, 2013), http://antitrust.bna.com/atrc/7033/split_display.adp?fedfid=35698743&vname=atrcnotallissues&wsn=499968000&searchid=23793196&doctypeid=1&type=oascore4news&mode=doc&split=0&scm=7033&pg=0.

Graphic 1–Comparison between the average merger review terms (Law 8.884/94–2009 to 2011–and Law 12.529/11–2012 and 2013)



Source: CADE

Table 1–Statistics from CADE’s General-Superintendence (2012 to 2014)

Year	No. Fast Track (Entry)*	No. Ordinary (Entry)*	No. Summary Opinions	Average Time – Fast Track	No. Ordinary Opinions	Average Time - Ordinary	Total
2012	121	17	106	18,7	8	41,3	138
2013	334	41	319	19,4	32	65,1	375
2014**	124	21	131	21,1	23	78,3	145
*including cases withdrawn							
**data updated up to 20 May 2014							658

Source: CADE-Data updated up to May 20, 2014.

Table 2–Average terms of the General-Superintendence only regarding ordinary cases (distributed by brackets of terms of discovery)

Brackets	Number of Cases	Average (days)	Representativeness (%)
Considering all cases	63	67	100
taking out only the ones challenged by the GS (07)	56	58	89
taking out only the ones above 100 days (10)	53	51	84
taking out only the ones above 67 days (general average term) (21)	42	44	67
taking out only the ones above 50 days (34)	29	39	46

Source: CADE -Data updated up to 20 May 2014.

As easily noticable from the data presented above, the efficiency gain in the new prior analysis of mergers in comparison to the former system is undeniable. In as early as the first year, the decrease was drastic, going from an average term of 154 days in 2011 to twenty-one days in 2012 (representing approximately an 86 percent decrease in terms). Equally important, the average review period remained steady from 2012 onwards, but the number of transactions considerably increased in 2013 and until May 2014. Currently, this average term is twenty-six days. It must be stressed that this term counts in all the procedures (fast track and ordinary) and also encompasses the discovery period carried out by the GS, as well as the ruling period by the Tribunal. In regards to ordinary cases, the term includes the period carried out by the GS and the Tribunal, which accounts for an average review term in April 2014 of eighty-one days—still below the maximum term (240 days, which can be extended for 90 more days) established by law. It should be noted that only one merger⁹⁷ decision surpassed the 240 day deadline among the 619 current decisions.⁹⁸

In relation to the ordinary cases, Table 2 clearly shows that the vast majority of the sixty-three cases already instructed by the GS had an analysis review term shorter than 100 days and also shorter than the general average (sixty-seven days in the GS). In the first case, only ten analyses surpassed 100 days, which means that over 84 percent of the cases were solved in a shorter time frame. In the second case, only twenty-one analyses surpassed sixty-seven days, which is the current average term for ordinary cases in the GS and means that almost 70 percent of the cases were solved in a term shorter than the average. Further, almost half (46 percent) of the total amount of ordinary cases already examined by the Superintendence was below fifty days.

There are also five ordinary cases that were approved in a shorter term than the maximum term determined for the fast track procedure, which is thirty days. Finally, of the ten cases that surpassed 100 days of review, the “outliers” in the universe of ordinary cases already examined by the GS, six were challenged by the Tribunal (five of which with a declaration of complexity)⁹⁹ and the other four had problems in the presentation of in-

97. This was the case of the merger between the higher education institutions, Anhanguera and Kroton, which had its term extended upon request by the Tribunal, having used 301 days until its final decision, for the approval conditional upon the fulfillment of a number of measures provided for in a Concentrations Control Agreement (CCA), entered into by CADE and the claimants. *See* Ato de Concentração No. 08700.005447/2013-12, de 06 de maio de 2014 CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Braz.), available at http://www.cade.gov.br/temp/D_D000000776091737.pdf.

98. Data updated to 20 May 2014. *See generally* ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50.

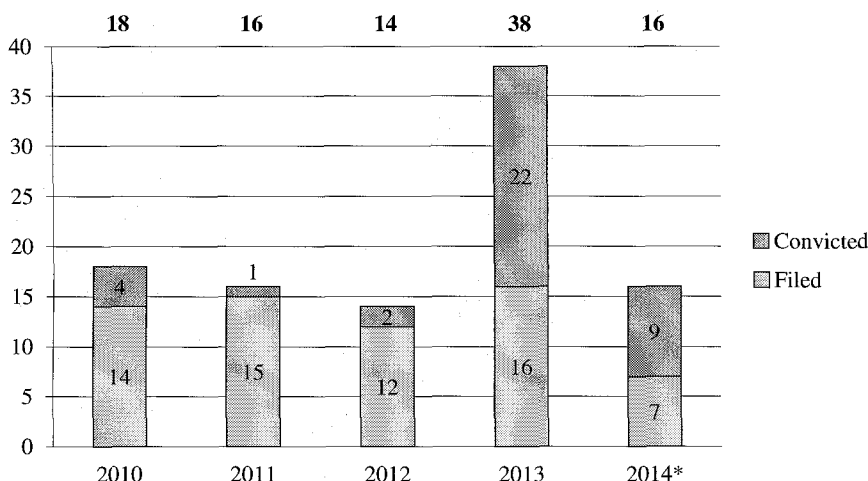
99. Article 120 of CADE's Internal Regulations, which creates the “declaration of complexity,” as to regulate the GS' request for an extension of term provided for in §2 of Article 88 of Law 12.529/11. Article 120 establishes in its main section that “The General-Superintendence may, through a duly reasoned decision, declare the transaction as a complex one and determine the realization of a new supplemen-

formation by the parties (some of those were even initially submitted as fast track). It should also be stressed that, even if we add up the terms used by the Tribunal to judge the cases that were challenged by the GS until May 2014 (ten in total) or that were arrogated by them (three), these averages would not be significantly altered.

Lastly, it is worth mentioning that the good performance by CADE in the analysis of mergers generated a positive impact on its repressive mission concerning the fight against anticompetitive behaviors, especially cartels. In 2013, CADE judged the greatest number of proceedings referring to anti-competitive behaviors registered in the last years—thirty-eight cases (as per Graphic 2 below). Of these, twenty-two were convicted, including thirteen cartel cases. In total, the penalties applied by CADE add up to R\$4916 million.¹⁰⁰ These values are sent to the Collective Rights Protection Fund and they may return to society under the form of financing of projects regarding the protection of consumer rights, the environment, historical and cultural heritage, among others.

Ever since the creation of the new law, the GS concluded the analysis of 271 behavioral cases, filing them or forwarding them for ruling by the Tribunal.¹⁰¹ The stock of behaviors inherited from SDE by the new CADE, which was 444 proceedings on May 29, 2012, has been reduced to 296 in May 2014, also including the ones initiated during this period.¹⁰²

Graphic 2—Anticompetitive behaviors cases judged by CADE from 2010 to 2014



Source: CADE

tary investigation, specifying the diligences to be performed.” See Lei No. 12.529/11, de 30 de Novembro de 2011 D.O.U. de 30.11.2011, art. 88, § 2 (Braz.); see also Resolução No. 1, de 29 de Maio de 2012, D.O.U. de 31.5.2012, art. 120 (Braz.).

100. CADE, BALANCE 2013 14 (2014), available at <http://www.cade.gov.br/upload/Balan%C3%A7o%202013%20.pdf>.

101. See ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50, at 199.

102. See *id.*

V. CONCLUSION

As explained throughout this paper, the legal revision of the Brazilian Competition Protection System addressed the structural “bottlenecks” that hindered the execution of the Brazilian antitrust policy in a satisfactory manner. The data presented speaks for itself. In only one year, the average term of analysis of mergers was reduced by over 80 percent, compared to the best average reached during the effectiveness of Law 8.884/94 and not to its historical average. Further, the productivity gains in the analysis of mergers reached by CADE in these two first years also reflected directly on its repressive role with considerable gains in the numbers related to the fight against cartels and other unilateral behaviors. These results motivated a series of recognition acts concerning CADE’s managerial innovations.

After the internal public and, mainly, the agents in the Brazilian antitrust policy demonstrated their recognition of the new bodies’ good start, the international antitrust community also took notice of the improvements. The “Global Competition Review” (GCR), an important international newspaper on competition protection in their annual ranking of antitrust agencies, granted in 2013 another half star to the new CADE, which already had 3.5 stars in the previous year, hoisting it to the top ten of the competition authorities in the world.¹⁰³ Brazil went from the 13th position to the 8th position, going from the “good” category to the “very good” category, only behind renowned agencies such as the United States (FTC and DOJ), the European Commission, England (UK’s Competition Commission), Germany, France, and Japan. It boosted Brazil to the same level as Australia, the Netherlands, Spain, and England (UK’s Office of Fair Trade), and ahead of Canada, Korea, Italy, and New Zealand. Out of developing countries, Brazil appears in the first place.¹⁰⁴ CADE’s main highlights in the evaluation made by GCR were (i) success in the transition to Law 12.529/11; (ii) prior analysis of mergers; (iii) new notification criteria; (iv) analysis of fast track mergers in an average term of 19 days—one of the fastest in the world; and (v) the refining of the fight against cartels.¹⁰⁵

Towards the end of November 2013, the project, referring to the new process of analysis of mergers, was ranked within the ten first places (among 102 registered) in the 18th competition of innovation in the public service, promoted by the National School of Public Administration (ENAP) in partnership with the Ministry of Planning, Budget and Management (MPOG), which was unprecedented for CADE.¹⁰⁶ The purpose of the competition, which has been promoted for seventeen years, is to

103. See *Rating Enforcement 2013*, GLOBAL COMPETITION REV., http://www.autoridade-laconcurrence.fr/doc/gcr_rating13.pdf (last visited Nov. 7, 2014).

104. *Id.*

105. *Id.*

106. Information on this partnership was released by TVNBR, a Brazilian TV news agency, on April 10, 2014. See *Iniciativa reduz tempo de análise de processos na área de defesa econômica* [Initiative reduces analysis time of economic processes in

stimulate the dissemination of innovative solutions in organizations of the Federal Government. On April 8, 2014, at an event taking place in ENAP's headquarters, CADE was ranked 7th and obtained the innovation stamp, an already renowned brand in the Brazilian federal public service for the recognition of managerial practices, which have promoted innovations of proven efficiency in their fields of action.¹⁰⁷

In conclusion, the managerial innovations refined the use of the institution's human capital (always very scarce in the public sector), privileged the internal communication and the information flow—splitting responsibilities among all involved in an empowerment process, which generates the feeling of belonging to the organization for the whole group and, consequently, creates greater motivation and a good organizational atmosphere.¹⁰⁸ The costs involved in its development were low¹⁰⁹ because it did not rely on complex information technology systems and completely focused on the human material available, which may very well be reproduced in other bodies that have great volumes of demands with different complexity levels that are above the team's production capacity.¹¹⁰

the area of defense], YOUTUBE (Apr. 10, 2014), <https://www.youtube.com/watch?v=wiQv5doYxQ4>.

107. The complete video of the award ceremony, which includes presentations on all the projects that were awarded that year, was released by TVNBR on April 9, 2014. See *Prêmio reconhece iniciativas inovadoras implantadas na Administração Federal* [Award recognizes innovative initiatives implemented in the Federal Administration], YOUTUBE (Apr. 9, 2014), https://www.youtube.com/watch?v=rbF_ynOxONM.

108. See ESCOLA NACIONAL DE ADMINISTRAÇÃO PÚBLICA, *supra* note 50, at 204.

109. See *id.* at 195.

110. See *id.* at 194–95, 203–04.